

AMENDED IN SENATE JUNE 21, 2004  
AMENDED IN SENATE JUNE 15, 2004  
AMENDED IN SENATE JULY 8, 2003  
AMENDED IN SENATE JULY 2, 2003  
AMENDED IN ASSEMBLY MAY 20, 2003  
AMENDED IN ASSEMBLY MAY 13, 2003  
AMENDED IN ASSEMBLY APRIL 30, 2003  
AMENDED IN ASSEMBLY APRIL 10, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1143**

**Introduced by Assembly Member Simitian**

February 21, 2003

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An act to amend Section 1985.3 of the Code of Civil Procedure, relating to Internet communications.

LEGISLATIVE COUNSEL'S DIGEST

AB 1143, as amended, Simitian. Civil procedure: Internet communications.

Existing law establishes the procedures by which a party may seek to produce personal records maintained by certain professionals and business entities in a civil action, as specified.

This bill would establish new procedures for the production by an interactive computer service of online consumer information, as specified. *The bill would further make a specified statement of*

*legislative intent with regard to those services and good faith procedures.*

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. *It is the intent of the Legislature that an*  
2 *interactive computer service shall be considered to have complied*  
3 *with the provisions of this act if it adopts and follows good faith*  
4 *procedures designed to ensure compliance with this act.*

5 SEC. 2. Section 1985.3 of the Code of Civil Procedure is  
6 amended to read:

7 1985.3. (a) For purposes of this section, the following  
8 definitions apply:

9 (1) “Personal records” means the original, any copy of books,  
10 documents, other writings, or electronic data pertaining to a  
11 consumer and that are maintained by any “witness” which is a  
12 physician, dentist, ophthalmologist, optometrist, chiropractor,  
13 physical therapist, acupuncturist, podiatrist, veterinarian,  
14 veterinary hospital, veterinary clinic, pharmacist, pharmacy,  
15 hospital, medical center, clinic, radiology or MRI center, clinical  
16 or diagnostic laboratory, state or national bank, state or federal  
17 association (as defined in Section 5102 of the Financial Code),  
18 state or federal credit union, trust company, anyone authorized by  
19 this state to make or arrange loans that are secured by real property,  
20 security brokerage firm, insurance company, title insurance  
21 company, underwritten title company, escrow agent licensed  
22 pursuant to Division 6 (commencing with Section 17000) of the  
23 Financial Code or exempt from licensure pursuant to Section  
24 17006 of the Financial Code, attorney, accountant, institution of  
25 the Farm Credit System, as specified in Section 2002 of Title 12  
26 of the United States Code, telephone corporation which is a public  
27 utility, as defined in Section 216 of the Public Utilities Code,  
28 psychotherapist, as defined in Section 1010 of the Evidence Code,  
29 a private or public preschool, elementary school, secondary  
30 school, or postsecondary school as described in Section 76244 of  
31 the Education Code, or an interactive computer service. For an  
32 interactive computer service, “personal records” means a first and  
33 last name, pseudonym, home or other physical address, including



1 the name of a city, town, or street, e-mail address, telephone  
2 number, social security number, Internet protocol (IP) address, or  
3 any other identifier or combination of information that allows for  
4 the identification of a consumer.

5 (2) “Interactive computer service” means any information  
6 service, system, or access software provider that provides or  
7 enables computer access by multiple users to a computer service,  
8 including, but not limited to, a service or system that provides  
9 access to the Internet and such systems operated or services offered  
10 by libraries or educational institutions.

11 (3) “Consumer” means any individual, partnership of five or  
12 fewer persons, association, or trust which has transacted business  
13 with, or has used the services of, the witness or for whom the  
14 witness has acted as agent or fiduciary.

15 (4) “Subpoenaing party” means the person or persons causing  
16 a subpoena duces tecum to be issued or served in connection with  
17 any civil action or proceeding pursuant to this code, but shall not  
18 include the state or local agencies described in Section 7465 of the  
19 Government Code, or any entity provided for under Article VI of  
20 the California Constitution in any proceeding maintained before  
21 an adjudicative body of that entity pursuant to Chapter 4  
22 (commencing with Section 6000) of Division 3 of the Business and  
23 Professions Code.

24 (5) “Deposition officer” means a person who meets the  
25 qualifications specified in paragraph (3) of subdivision (d) of  
26 Section 2020.

27 (b) Prior to the date called for in the subpoena duces tecum for  
28 the production of personal records, the subpoenaing party shall  
29 serve or cause to be served on the consumer whose records are  
30 being sought a copy of the subpoena duces tecum, of the affidavit  
31 supporting the issuance of the subpoena, if any, and of the notice  
32 described in subdivision (e), and proof of service as indicated in  
33 paragraph (1) of subdivision (c). This service shall be made as  
34 follows:

35 (1) To the consumer personally, or at his or her last known  
36 address, or in accordance with Chapter 5 (commencing with  
37 Section 1010) of Title 14 of Part 3, or, if he or she is a party, to his  
38 or her attorney of record. If the consumer is a minor, service shall  
39 be made on the minor’s parent, guardian, conservator, or similar  
40 fiduciary, or if one of them cannot be located with reasonable



1 diligence, then service shall be made on any person having the care  
2 or control of the minor or with whom the minor resides or by whom  
3 the minor is employed, and on the minor if the minor is at least 12  
4 years of age.

5 (2) Not less than 10 days prior to the date for production  
6 specified in the subpoena duces tecum, plus the additional time  
7 provided by Section 1013 if service is by mail.

8 (3) At least five days prior to service upon the custodian of the  
9 records, plus the additional time provided by Section 1013 if  
10 service is by mail.

11 (4) If a subpoenaing party seeking personal records from an  
12 interactive computer service is unable to execute service of  
13 process under paragraph (1), it shall be made as follows:

14 (A) If the subpoenaing party has an e-mail address for the  
15 consumer, to the consumer at the e-mail address not less than 20  
16 days prior to the date of production, along with the declaration  
17 required by paragraph (6).

18 (B) If the subpoenaing party has neither an e-mail nor a postal  
19 address for the consumer, on the interactive computer service from  
20 which personal records are sought not less than 34 days prior to the  
21 date for production with payment sufficient to cover first-class  
22 postage for mailing to the consumer.

23 (5) If service is made on an interactive computer service under  
24 subparagraph (B) of paragraph (4), the interactive computer  
25 service shall notify the consumer no later than 14 days,  
26 alternatively, as follows:

27 (A) If the consumer is a paid subscriber and a mailing address  
28 is on file with the interactive computer service, the subpoena, any  
29 supporting affidavits, the notice described in subdivision (e), and  
30 the declaration required by paragraph (6) shall be sent via  
31 first-class mail to the consumer.

32 (B) If the consumer is not a paid subscriber or is a paid  
33 subscriber without a mailing address on file with the interactive  
34 computer service, and his or her e-mail address is on file with the  
35 interactive computer service, the notice described in subdivision  
36 (e) and the declaration required by paragraph (6) shall be sent to  
37 the e-mail address on file or the e-mail address specified by the  
38 consumer as the address to be used for notice by the interactive  
39 computer service. If no e-mail address is on file with the

1 interactive computer service, no further action is required to meet  
2 the obligations of this subdivision.

3 (C) Sections ~~1013 and 1010.6~~ *1010.6 and 1013* do not apply to  
4 any notification sent by an interactive computer service to a  
5 consumer.

6 (6) Service made pursuant to subparagraph (B) of paragraph  
7 (4) and paragraph (5) shall include a declaration, without  
8 attachments or exhibits in ~~an electronic format as directed by the~~  
9 ~~interactive computer service~~ *a plain text electronic file*, and shall  
10 contain all of the following:

11 (A) A statement of the cause of action, and, if the action relates  
12 to communications, the communications that are the subject of the  
13 action, the subpoena, or both.

14 (B) A statement explaining how, or in what manner, the  
15 personal records are directly relevant to a ~~core~~ claim or defense.

16 (C) A statement that other reasonable efforts to serve the  
17 consumer have not been effective, that the subpoena is issued in  
18 good faith and not for an improper purpose, and that the interactive  
19 computer service to which the subpoena is addressed is likely to  
20 have responsive personal records.

21 (D) The name of all courts in which complaints or motions  
22 relating to this subpoena have been filed, and all corresponding  
23 case numbers.

24 (E) The date of production.

25 (F) A statement that the subpoenaing party attests to the  
26 accuracy of the foregoing information.

27 (7) The ~~ICS~~ *interactive computer service* has no duty to track  
28 the mail or e-mail notice served under paragraphs (4) and (5).  
29 Should notice fail due to an invalid mail or e-mail address, the ~~ICS~~  
30 *interactive computer service* has no further notification  
31 obligations.

32 (c) Prior to the production of the records, the subpoenaing party  
33 shall do either of the following:

34 (1) Serve or cause to be served upon the witness a proof of  
35 personal service or of service by mail attesting to compliance with  
36 subdivision (b).

37 (2) Furnish the witness a written authorization to release the  
38 records signed by the consumer or by his or her attorney of record.  
39 The witness may presume that any attorney purporting to sign the  
40 authorization on behalf of the consumer acted with the consent of

1 the consumer, and that any objection to release of records is  
2 waived.

3 (d) A subpoena duces tecum for the production of personal  
4 records shall be served in sufficient time to allow the witness a  
5 reasonable time, as provided in paragraph (1) of subdivision (d) of  
6 Section 2020, to locate and produce the records or copies thereof.

7 (e) Every copy of the subpoena duces tecum and affidavit, if  
8 any, served on a consumer or his or her attorney in accordance with  
9 subdivision (b) shall be accompanied by a notice, in a typeface  
10 designed to call attention to the notice, indicating that (1) records  
11 about the consumer are being sought from the witness named on  
12 the subpoena; (2) if the consumer objects to the witness furnishing  
13 the records to the party seeking the records, the consumer must file  
14 papers with the court or serve a written objection as provided in  
15 subdivision (g) prior to the date specified for production on the  
16 subpoena; and (3) if the party who is seeking the records will not  
17 agree in writing to cancel or limit the subpoena, an attorney should  
18 be consulted about the consumer's interest in protecting his or her  
19 rights of privacy. If a notice of taking of deposition is also served,  
20 that other notice may be set forth in a single document with the  
21 notice required by this subdivision.

22 (f) A subpoena duces tecum for personal records maintained by  
23 a telephone corporation that is a public utility, as defined in Section  
24 216 of the Public Utilities Code, shall not be valid or effective  
25 unless it includes a consent to release, signed by the consumer  
26 whose records are requested, as required by Section 2891 of the  
27 Public Utilities Code.

28 (g) Any consumer whose personal records are sought by a  
29 subpoena duces tecum and who is a party to the civil action in  
30 which this subpoena duces tecum is served may, prior to the date  
31 for production, bring a motion under Section 1987.1 to quash or  
32 modify the subpoena duces tecum or other motion that stays or  
33 limits discovery. Notice of the bringing of that motion shall be  
34 given to the witness and deposition officer at least five days prior  
35 to production. The failure to provide notice to the deposition  
36 officer shall not invalidate the motion to quash or modify the  
37 subpoena duces tecum or other motion, but may be raised by the  
38 deposition officer or witness as an affirmative defense in any  
39 action for liability for improper release of records.



1 Any other consumer or nonparty whose personal records are  
2 sought by a subpoena duces tecum may, prior to the date of  
3 production, serve on the subpoenaing party the witness, and the  
4 deposition officer, a written objection that cites the specific  
5 grounds on which production of the personal records should be  
6 prohibited.

7 No witness or deposition officer shall be required to produce  
8 personal records after receipt of notice that the motion has been  
9 brought by consumer, or after receipt of a written objection from  
10 a nonparty consumer, except upon order of the court in which the  
11 action is pending or by agreement of the parties, witnesses, and  
12 consumers affected.

13 The party requesting a consumer's personal records may bring  
14 a motion under Section 1987.1 to enforce the subpoena within 20  
15 days of service of the written objection. The motion shall be  
16 accompanied by a declaration showing a reasonable and good faith  
17 attempt at informal resolution of the dispute between the party  
18 requesting the personal records and the consumer or the  
19 consumer's attorney.

20 (h) Upon good cause shown and provided that the rights of  
21 witnesses and consumers are preserved, a subpoenaing party shall  
22 be entitled to obtain an order shortening the time for service of a  
23 subpoena duces tecum or waiving the requirements of subdivision  
24 (b) where due diligence by the subpoenaing party has been shown.  
25 The notice provisions of paragraphs (4) and (5) of subdivision (b)  
26 ~~are waived~~ *do not apply* if a court determines that a temporary  
27 restraining order may issue against the ~~pertinent defendant~~  
28 *consumer* without notice. Instead, the subpoenaing party shall  
29 serve the temporary restraining order and notice of entry on the  
30 interactive computer service concurrent with the subpoena for  
31 personal records.

32 A party moving for a temporary restraining order pursuant to  
33 Section 527 who cannot give notice to an opposing party because  
34 the information needed to give notice to that opposing party is  
35 contained in personal records maintained by an interactive  
36 computer service, shall be deemed to have met the requirements  
37 of subparagraph (B) of paragraph (2) of subdivision (c) of Section  
38 527 as to that opposing party upon attorney or party certification  
39 of that fact to the court.



1 (i) This section shall not be construed to apply to any subpoena  
2 duces tecum that does not request the records of any particular  
3 consumer or consumers and that requires a custodian of records to  
4 delete all information that would in any way identify any consumer  
5 whose records are to be produced.

6 (j) This section does not apply to proceedings conducted under  
7 Division 1 (commencing with Section 50), Division 4  
8 (commencing with Section 3200), Division 4.5 (commencing with  
9 Section 6100), or Division 4.7 (commencing with Section 6200)  
10 of the Labor Code, or to civil law enforcement actions brought in  
11 the name of the people by the Attorney General or a district  
12 attorney, to investigative subpoenas under Section 11180 of the  
13 Government Code, or to a subpoena issued by or on behalf of a  
14 licensee or owner of copyrighted work seeking the identity of an  
15 individual pursuant to the Digital Millennium Copyright Act (17  
16 U.S.C. Sec. 512(h)).

17 (k) Failure to comply with this section is sufficient basis for the  
18 witness to refuse to produce the personal records sought by a  
19 subpoena duces tecum.

20 (l) In the case of service under subparagraph (B) of paragraph  
21 (4) of subdivision (b), the interactive computer service from which  
22 personal records are subpoenaed, may bill the subpoenaing party  
23 for the reasonably necessary and directly incurred costs, including  
24 attorney's fees, associated with fulfilling the obligations required  
25 under this section. These reimbursable costs shall include any  
26 costs due to the necessary disruption of normal operations while  
27 complying with the subpoena, and shall not be governed by any  
28 fixed rates set forth in paragraph (1) of subdivision (b) of Section  
29 1563 of the Evidence Code or any other statute. The subpoenaing  
30 party shall pay the bill in full, or make a motion to the court to  
31 reduce these fees based on the unreasonableness of the costs  
32 claimed within 30 days of receipt. The interactive computer  
33 service may make a motion to the court to compel the payment of  
34 any costs provided for in this subdivision, and shall be entitled to  
35 recover reasonable attorney's fees and costs from the subpoenaing  
36 party if it prevails on that motion.

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